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No. 88-512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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No. 88-1512

IN THE

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OCTOBER TERM, 1988

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the Product Liability Advisory Council ("PLAC") hereby moves this Court for leave to file the enclosed brief as amicus curiae in support of the Respondent herein. As grounds for this motion, Amicus Curiae states as follows:

1) PLAC is a non-profit member corporation whose principal purpose is to submit briefs, as friend of the

court, in cases involving significant issues affecting the law of product liability.

2) PLAC represents a broad cross-section of product manufacturers, and the PLAC membership roster is attached to this motion and brief as Exhibit A.

3) Most, if not all, members of PLAC do business in Mississippi and thus have a direct and vital interest in the limitations issue involved in this case.

4) Most, if not all, members of PLAC are subject to personal jurisdiction and venue in more than one state and thus have a direct and vital interest in the procedural and conflict of law issues raised by Petitioners' use of 28 U.S.C. Section 1404(a) in this case.

5) Amicus Curiae believes that the practical effect and consequences of the holding in this case, beyond the limitations question to other procedural and conflict of law issues, has not been fully explored in the briefs that have been or will be filed.

6) That counsel for Respondent has consented to the filing of this Amicus Curiae Brief, but counsel for Petitioners has refused to consent, thus necessitating this motion.

DATED: August 2, 1989.

Respectfully submitted,

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On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council ("PLAC") is a non-profit, broad-based group of product manufacturers and distributors. Its principal purpose is to submit briefs, as friend of the court, in cases involving significant issues affecting the law of product liability. Most, if not all,

members of PLAC do business in Mississippi and thus have a direct and vital interest in the limitations issue involved in this case. Likewise, most, if not all, members of PLAC are subject to personal jurisdiction and venue in more than one state and thus have a direct and vital interest in the procedural and conflict of law issues raised by Petitioners' use of 28 U.S.C. Section 1404(a) in this case.

SUMMARY OF ARGUMENT

The Court of Appeal's holding—that the limitations law of the transferee forum governed the instant plaintiff-initiated transfer under 28 U.S.C. Section 1404(a)—is consistent with this Court's holding in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), that Section 1404(a) should not be used as a forum shopping device or as a means to escape the *Erie* doctrine. Petitioners' machinations to engraft an unrelated state's statute of limitations to a case long since barred under the law of their home state and the convenient forum go far beyond forum shopping and, if allowed, would permit plaintiffs to make similar use of Section 1404(a) to obtain all kinds of procedural law advantages and even different substantive law through another state's conflict of law rules. The ultimate result would be that cases that otherwise would have been filed in state court will be filed in the already overcrowded federal court system anytime that plaintiff can find a state where the defendant is subject to personal jurisdiction and where some advantage, not available in the convenient forum, can be obtained.

ARGUMENT

I.

PETITIONERS' ATTEMPTED USE OF SECTION 1404(a) TO TRY THIS PENNSYLVANIA CASE IN PENNSYLVANIA UNDER MISSISSIPPI LIMITATIONS LAW EXTENDS "FORUM SHOPPING" INTO A "GRAFTING" PROCEDURE WHOLLY AT ODDS WITH THIS COURT'S RATIONALE IN *VAN DUSEN*.

Petitioners urge that this case does not involve impermissible "forum shopping" (Petitioners' Br. 22-23). In a literal sense, Petitioners are correct. Petitioners' chosen forum for this action is Pennsylvania, and through their Section 1404(a) motion they have elected to try the case in Pennsylvania. What Petitioners actually have "shopped for" is not another forum, but a piece of limitations law from a totally disinterested state, which law they have then attempted to "engraft" into their tort action so that it remains even after the case is transferred back to their chosen forum, Pennsylvania, where the statute of limitations has long since run.

Petitioners candidly state in their Motion for Change of Venue under Section 1404(a):

> Plaintiffs' claim does not arise out of or have any connection with any acts by the Plaintiffs or Defendant or facts or circumstances arising in this State and this District. (Joint Appendix., p. 26)

Thus, by their own assertion, Petitioners filed this suit in the District Court for the Southern District of Mississippi, even though Mississippi had absolutely "no connection" with the case—for the sole purpose of reviving their tort cause of action that was barred by the statute of limitations in the forum (Pennsylvania) where it arose.

where it belonged, and where they already had pending in the federal court an action for breach of warranty involving the same facts and parties. But Petitioners had no desire or intention to try the case in Mississippi. Rather, through their Section 1406(a) motion they had the tort case transferred back to the Pennsylvania federal court hoping that the engrafted Mississippi limitations law would keep the resurrected tort case alive, though in Pennsylvania it had been dead for years.

Faced with these maneuvers, the Court of Appeals for the Third Circuit sensibly held that such limitations "shopping," would literally impose on every multi-state defendant a federal statute of limitations equal to the longest statutory limitation period among those states where it was subject to personal jurisdiction. The Court of Appeals correctly concluded that such a result was not consistent with the purpose or the intent of Section 1406(a) and did not come within the rationale for applying the transferor forum's law set forth by this Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), for defendant-initiated transfers. In the language of the Court of Appeals, *Ferens v. Deere & Co.*, 862 F.2d 31, 36 (3d Cir. 1988), compelling application of the transferor forum's law to plaintiff-initiated transfers "would be contrary to the principles set forth in *Van Dusen*," 376 U.S. at 626, wherein this Court indicated that Section 1404(a) was not to be given any interpretation that allowed it to be used as a "forum shopping instrument" or as a means to avoid the holding in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Van Dusen found good reason to allow the transferor forum's procedural laws and rules to govern a case where the defendant initiates the transfer. Defendants should not be able to use Section 1404(a) to change the law—substantive or procedural—controlling a case (*Van Dusen*, 376 U.S. at 639). But plaintiffs should not be able to do so either. The very same *Van Dusen* rationale, compelling application of the transferor forum's law to defendant-initiated transfers, should result in application of the transferee forum's law in this case and other plaintiff-initiated transfers.

II.

THE INTERPRETATION OF SECTION 1406(a) URGED BY PETITIONERS IS NOT RESTRICTED TO LIMITATIONS CASES.

This case involves a plaintiff's attempted use of Section 1406(a) to engraft an unrelated state's favorable statute of limitations to his action. But if this use of Section 1406(a) is proper and the transferor forum's procedural law governs even where plaintiff initiates the transfer, this tactic will not be restricted to statute of limitations cases. Instead, if Petitioners are right, all plaintiffs in diversity cases will be able to search out procedural advantages in any state in which a defendant is subject to personal jurisdiction, file suit there, and then have the case transferred back to the convenient forum with all the procedural advantages of the initial filing attached to it. Burden of proof, capacity to sue, evidentiary privileges, competency of witnesses, necessary parties, service of process, security for costs, set-offs, right to jury, and sufficiency of the evidence are just a few of the normally "procedural" matters that would be subject to this same Section 1406(a) strategy. See Restatement (Second) of Conflict of Laws, Sections 122-144 (1971).

Nor would such a use of Section 1406(a) be limited to only procedural advantages. Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the applicable conflict of law rules in a diversity case are the conflict of law rules of the forum state. Thus, a plaintiff in the ap-

propriate conflicts case could use Section 1404(a) to change the substantive law applicable to the claim, and still try the case in its most appropriate and convenient forum.

To illustrate, assume hypothetically the same facts as in the instant case except that plaintiffs' farm straddled the Pennsylvania-Ohio border and that the accident actually occurred in Ohio. Assume further that the Ohio substantive law gave plaintiffs substantial law advantages in the amount of damages recoverable and the legal theories available. Assume further that Pennsylvania conflict of law rules have rejected the "lex loci delicti" rule in favor of the most significant contacts rule and therefore a district court in Pennsylvania would apply Pennsylvania substantive law. Nevertheless, if Petitioners' contentions here were valid, plaintiffs could avoid Pennsylvania substantive law simply by filing suit in the federal district court of some other state whose conflict of law rules still adhere to the "lex loci delicti" rule and where John Deere does business, thereby compelling application of Ohio substantive law. Having successfully shopped for and engrafted Ohio substantive law to their action, plaintiffs could then transfer the case back to Pennsylvania for trial under the favorable Ohio law!

III.

IF THE TRANSFEROR FORUM'S LAW IS APPLIED TO PLAINTIFF-INITIATED TRANSFERS, FEDERAL COURTS WILL BECOME A HAVEN FOR EVERY CASE IN WHICH A PLAINTIFF CAN USE SECTION 1404(a) TO OBTAIN A SIMILAR PROCEDURAL OR SUBSTANTIVE LAW ADVANTAGE.

If Petitioners' view of Section 1404(a) were upheld, then any competent plaintiff's lawyer could and should file suit in federal court anytime that diversity of citizenship exists and there is also any procedural or choice of law advantage in a state in which a given defendant is subject to jurisdiction, regardless of that state's lack of nexus or connection to the particular cause of action involved. Then, having filed suit in the federal district court of the state giving plaintiff such an advantage, counsel can then use Section 1404(a) to transfer the case back to its most convenient and proper forum—thereby burdening and expending the resources of two federal courts.

Thus, it is no exaggeration to expect that the already overloaded federal court calendars will be burdened with multiple suits filed in federal court solely to come within a statute of limitations here, or to pick off a favorable procedural rule there, or to capture a wholly different substantive law theory through the use of different conflict of law rules in still another jurisdiction, after which the case can then be transferred back to the federal court sitting in the convenient state where plaintiff always desired and intended to try it.[5]

In this computerized age, it is no flight of fancy to foresee that with the assistance of a computer and appropriate data bases, plaintiffs will need only an instant to determine exactly what state will give them the best advantages to engraft onto their action before bringing the case back to its home state under Section 1404(a).

Again, such results cannot have been intended either by Congress when it enacted Section 1404(a) or by this Court when it decided *Van Dusen*.

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[5] The overcrowded federal docket has been repeatedly recognized by this Court. *See, e.g., Burlington N.R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 464 (1987); *United States v. Mendoza*, 464 U.S. 154, 161 (1984); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 127 (1979) (Rehnquist, J., dissenting).

CONCLUSION

In *Van Dusen*, this Court astutely cautioned that there might be different considerations that would mandate that the transferor forum law rule not be applied to plaintiff-initiated Section 1404(a) transfers, *Van Dusen v. Barrack*, 376 U.S. 612, 640 (1964). As set forth above and in Respondent's Brief, there are numerous considerations which should prevent the law of the transferor forum from being applied in plaintiff-initiated transfers, and indeed the *Van Dusen* goals of eliminating forum shopping and staying within the parameters of the *Erie* doctrine will be fulfilled only if this Court concurs with the Court of Appeals that the transferee forum's law applies in plaintiff-initiated transfers.

Accordingly, this Amicus Curiae respectfully urges that this Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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EXHIBIT A

The members of PLAC are: American Home Products Corporation; American Telephone & Telegraph; AMOCO Corporation; Anheuser-Busch Companies, Inc.; Automobile Importers of America, Inc.; The Budd Company; Caterpillar, Inc.; Chrysler Corporation; Clark Material Systems Technology Company; The Coleman Company; Dana Corporation; Dow Chemical Company; Eaton Corporation; Exxon Corporation; Federal-Mogul Corporation; FMC Corporation; Fiat Auto U.S.C. and Ferrari, N.A.; Ford Motor Company; Fruehauf Corporation; General Electric Company; General Motors Corporation; Goodyear Tire & Rubber Co.; Great Dane Trailers, Inc.; Harnischfeger Industries, Inc.; Honda North America, Inc.; Hyundai Motor America; Johnson Controls; Kawasaki Motors Corporation, U.S.A.; Merck & Co., Inc.; Mitsubishi Motor Sales of America; Monsanto Company; Motor Vehicle Manufacturers Association of the United States, Inc. and its members; Navistar International Transportation Corp.; Nissan Motor Corporation, U.S.A.; Otis Elevator Company; PACCAR, Inc.; Playtex, Inc.; Porsche Cars North America, Inc.; The Procter & Gamble Company; RJR Nabisco, Inc.; Rockwell International; Saab-Scania of America, Inc.; Squibb Corporation; Strum, Ruger and Company; Subaru of America, Inc.; TRW, Inc.; Toyota Motor Sales, U.S.A., Ltd.; U-Haul International; Union Carbide Corporation; UNOCAL 76; U.S. Tobacco; USX Corporation; Volkswagen of America, Inc.; Volvo North America Corporation; Jervis B. Webb Company; Yamaha Motor Corporation U.S.A.